

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 06, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MOLLY O.,

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:20-CV-00340-JAG

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 18, 19. Attorney Dana Madsen represents Molly O. (Plaintiff); Special Assistant United States Attorney Franco Becia represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

I. JURISDICTION

Plaintiff filed an application for Supplemental Security Income on June 15, 2017, alleging disability since January 1, 2014, due to fibromyalgia, degenerative disc disease, depression, and anxiety. Tr. 92. The application was denied initially and upon reconsideration. Tr. 125-29, 129-31. Administrative Law Judge (ALJ)

1 Jesse Shumway held hearings on June 4, 2019 and September 24, 2019, Tr. 38-91,
2 and issued an unfavorable decision on November 12, 2019. Tr. 20-32. Plaintiff
3 requested review by the Appeals Council and the Appeals Council denied the
4 request for review on July 30, 2020. Tr. 1-5. The ALJ's November 2019 decision
5 became the final decision of the Commissioner, which is appealable to the district
6 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
7 on September 23, 2020. ECF No. 1.

8 **II. STATEMENT OF FACTS**

9 Plaintiff was born in 1976 and was 41 years old when she filed her
10 application. Tr. 92. She has a high school diploma and two Associate's degrees and
11 has worked in customer service, retail, production, tattooing and sawmill cleanup
12 as well as a disc jockey. Tr. 265, 435. She has alleged disability based on severe
13 fatigue and weakness from fibromyalgia, anxiety, depression, balance and
14 cognitive problems, frequent migraines, difficulty dealing with people, and
15 continual absences. Tr. 274.

16 **III. STANDARD OF REVIEW**

17 The ALJ is responsible for determining credibility, resolving conflicts in
18 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
19 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
20 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
21 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
22 only if it is not supported by substantial evidence or if it is based on legal error.
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
24 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
25 1098. Put another way, substantial evidence is such relevant evidence as a
26 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
27 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
28 rational interpretation, the Court may not substitute its judgment for that of the

1 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
 2 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
 3 administrative findings, or if conflicting evidence supports a finding of either
 4 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
 5 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
 6 supported by substantial evidence will be set aside if the proper legal standards
 7 were not applied in weighing the evidence and making the decision. *Browner v.*
 8 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

9 IV. SEQUENTIAL EVALUATION PROCESS

10 The Commissioner has established a five-step sequential evaluation process
 11 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 12 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant
 13 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
 14 at 1098-1099. This burden is met once a claimant establishes that a physical or
 15 mental impairment prevents the claimant from engaging in past relevant work. 20
 16 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
 17 proceeds to step five, and the burden shifts to the Commissioner to show (1) the
 18 claimant can make an adjustment to other work; and (2) the claimant can perform
 19 specific jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec.*
 20 *Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an
 21 adjustment to other work in the national economy, the claimant will be found
 22 disabled. 20 C.F.R. § 416.920(a)(4)(v).

23 V. ADMINISTRATIVE FINDINGS

24 On November 12, 2019, the ALJ issued a decision finding Plaintiff was not
 25 disabled as defined in the Social Security Act. Tr. 20-32.

26 At **step one**, the ALJ found Plaintiff had not engaged in substantial gainful
 27 activity since the protected filing date. Tr. 22.

1 At **step two**, the ALJ determined Plaintiff had the following severe
2 impairments: fibromyalgia, morbid obesity, calcific tendinosis of the left shoulder,
3 anxiety, and depression. *Id.*

4 At **step three**, the ALJ found Plaintiff did not have an impairment or
5 combination of impairments that met or medically equaled the severity of one of
6 the listed impairments. Tr. 23-25.

7 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
8 she could perform sedentary work, except:

9 She can only occasionally climb ramps and stairs, and never
10 kneel, crawl, or climb ladders, ropes, or scaffolds; she would be
11 limited to frequent overhead reaching with the left upper
12 extremity; she can have no exposure to hazards (e.g., unprotected
13 heights, moving mechanical parts); she cannot have concentrated
14 exposure to extreme cold or vibration; she would be limited to
15 simple, routine tasks consistent with a reasoning level of 2 or
16 less; she could tolerate only occasional, superficial contact with
17 the public, co-workers, and supervisors; and she would require a
18 routine, predictable work environment with no more than
19 occasional changes.

20 Tr. 25-26.

21 At **step four** the ALJ found Plaintiff was unable to perform her past relevant
22 work as an assistant manager, line appliance assembler, merchandise displayer,
23 food sales clerk, disc jockey, tattoo artist, or industrial cleaner. Tr. 30.

24 At **step five**, the ALJ found that, based on the testimony of the vocational
25 expert, and considering Plaintiff's age, education, work experience, and RFC,
26 Plaintiff was capable of performing jobs that existed in significant numbers in the
27 national economy, including the jobs of hand packager, final assembler, and
28 stuffer. Tr. 30-31.

1 The ALJ thus concluded Plaintiff was not under a disability within the
2 meaning of the Social Security Act at any time from the filing date through the
3 date of the decision. Tr. 31-32.

4 VI. ISSUES

5 The question presented is whether substantial evidence supports the ALJ's
6 decision denying benefits and, if so, whether that decision is based on proper legal
7 standards.

8 Plaintiff contends the ALJ erred by: (1) improperly discrediting Plaintiff's
9 symptom testimony; and (2) failing to properly consider and weigh the opinion
10 evidence.

11 VII. DISCUSSION

12 A. Plaintiff's Subjective Statements.

13 Plaintiff alleges the ALJ improperly disregarded her subjective symptom
14 reports. ECF No. 18 at 14-18.

15 It is the province of the ALJ to make determinations regarding a claimant's
16 subjective complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
17 However, the ALJ's findings must be supported by specific, cogent reasons.
18 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
19 produces medical evidence of an underlying medical impairment, the ALJ may not
20 discredit testimony as to the severity of an impairment merely because it is
21 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
22 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting
23 the claimant's testimony must be "specific, clear and convincing." *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834
25 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must identify
26 what testimony is not credible and what evidence undermines the claimant's
27 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
28 1993).

1 The ALJ found Plaintiff's medically determinable impairments could
2 reasonably be expected to cause some of the alleged symptoms; however, he found
3 Plaintiff's statements concerning the intensity, persistence and limiting effects of
4 her symptoms were not entirely consistent with the medical evidence and other
5 evidence in the record. Tr. 26-27. The ALJ found Plaintiff's allegations to be
6 inconsistent with the unremarkable objective evidence and undermined by her
7 limited work history, her statements about why she stopped working, her activities
8 (including being the sole caretaker for her grandchild and tending to regular
9 household upkeep), her relatively conservative and effective course of treatment,
10 and her inconsistent statements regarding marijuana use. Tr. 27-30.

11 Plaintiff argues the ALJ improperly found her symptoms to not be severe¹
12 based on the findings of non-examining, non-treating sources, and asserts that her
13 symptoms are well-documented in the treatment records. ECF No. 18 at 14-18.
14 Defendant argues the ALJ reasonably interpreted the record as being inconsistent
15 with Plaintiff's testimony, and also offered numerous other reasons for discounting
16 Plaintiff's allegations that are supported by substantial evidence, all of which were
17 not meaningfully challenged by Plaintiff in her briefing. ECF No. 19 at 3-13.

18 The Court finds the ALJ did not err. An ALJ may consider inconsistent
19 statements by the claimant and a claimant's limited work history or reasons for
20 stopping work in assessing the reliability of her symptoms. *Tonapetyan v. Halter*,
21 242 F.3d 1144, 1148 (9th Cir. 2001); *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th
22 Cir. 2002). An ALJ may also reasonably question a claimant's allegations if they
23 are inconsistent with her demonstrated activities. *Orn v. Astrue*, 495 F.3d 625, 639

24
25 ¹ Counsel does not appear to be using "severe" as the Social Security term of
26 art that it is, as the ALJ did find Plaintiff's fibromyalgia to be a severe impairment
27 at step two. Rather, Plaintiff appears to be arguing that the ALJ did not find her
28 symptoms to be as severe as she alleged.

1 (9th Cir. 2007). The ALJ considered all of these factors, and Plaintiff did not offer
2 any challenge to the ALJ's rationale in her motion for summary judgment.
3 Therefore, she has waived the arguments. *See Carmickle v. Comm'r of Soc. Sec.*
4 *Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth Circuit explained the
5 necessity for providing specific argument:

6
7 The art of advocacy is not one of mystery. Our adversarial system
8 relies on the advocates to inform the discussion and raise the
9 issues to the court. Particularly on appeal, we have held firm
10 against considering arguments that are not briefed. But the term
11 "brief" in the appellate context does not mean opaque nor is it an
12 exercise in issue spotting. However much we may importune
13 lawyers to be brief and to get to the point, we have never
14 suggested that they skip the substance of their argument in order
15 to do so. It is no accident that the Federal Rules of Appellate
16 Procedure require the opening brief to contain the "appellant's
contentions and the reasons for them, with citations to the
authorities and parts of the record on which the appellant relies."
Fed. R. App. P. 28(a)(9)(A). We require contentions to be
accompanied by reasons.

17 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).
18 Moreover, the Ninth Circuit has repeatedly admonished that the court will not
19 "manufacture arguments for an appellant" and therefore will not consider claims
20 that were not actually argued in appellant's opening brief. *Greenwood v. Fed.*
21 *Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).

22
23 Furthermore, while it cannot serve as the sole basis for disregarding a
24 claimant's reports, support from objective medical evidence is a "relevant factor in
25 determining the severity of the claimant's pain and its disabling effects." *Rollins v.*
26 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). The ALJ's interpretation of the
27 objective records as not substantiating Plaintiff's pain complaints was reasonable
28 and supported by the record. While Plaintiff offers an alternative interpretation of

1 the objective evidence, her arguments do not amount to demonstrating legal error
 2 on the part of the ALJ. “When the evidence is susceptible to more than one rational
 3 interpretation, we must uphold the ALJ’s findings if they are supported by
 4 inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104,
 5 1111 (9th Cir. 2012). The ALJ did not err.

6 **B. Opinion Evidence.**

7 Plaintiff alleges the ALJ erred by basing the decision on non-persuasive
 8 opinions from non-examining, non-treating doctors, while disregarding opinions
 9 from Dr. Artzis and Dr. Ashworth. ECF No. 18 at 18-19.²

10 Simply asserting that opinions should have been found to be more or less
 11 persuasive, without addressing any of the ALJ’s rationale, does not identify legal
 12 error. As discussed above, the Court will not consider claims that were not actually
 13 argued in Plaintiff’s opening brief. The Court finds Plaintiff has waived any
 14 challenge to the ALJ’s decision regarding the persuasiveness of the medical
 15 opinion evidence.

16 Even offering Plaintiff the benefit of the doubt, the Court finds no error in
 17 the ALJ’s analysis of Dr. Artzis or Dr. Ashworth.

18 For claims filed on or after March 27, 2017, new regulations apply that
 19 change the framework for how an ALJ must weigh medical opinion evidence.
 20 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
 21 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. § 416.920c. The new

22
 23 ² Plaintiff also faults the ALJ for relying on evidence from “Dr. Brown” who
 24 did not appear in the records. ECF No. 18 at 18. It is clear from the ALJ’s citations
 25 that references to Dr. Barry Brown were intended to be to Dr. Barry Bacon and the
 26 ALJ simply misread or misstated the doctor’s name. Tr. 27, citing Exhibit 5F/5 (Tr.
 27 444). Plaintiff does not otherwise challenge the substance of the ALJ’s assessment
 28 of Dr. Bacon.

1 regulations provide the ALJ will no longer give any specific evidentiary weight to
2 medical opinions or prior administrative medical findings, including those from
3 treating medical sources. 20 C.F.R. § 416.920c(a). Instead, the ALJ will consider
4 the persuasiveness of each medical opinion and prior administrative medical
5 finding, regardless of whether the medical source is an Acceptable Medical Source.
6 20 C.F.R. § 416.920c(c). The ALJ is required to consider multiple factors,
7 including supportability, consistency, the source's relationship with the claimant,
8 any specialization of the source, and other factors (such as the source's familiarity
9 with other evidence in the file or an understanding of Social Security's disability
10 program). *Id.* The regulations make clear that the supportability and consistency of
11 the opinion are the most important factors, and the ALJ must articulate how they
12 considered those factors in determining the persuasiveness of each medical opinion
13 or prior administrative medical finding. 20 C.F.R. § 416.920c(b). The ALJ may
14 explain how they considered the other factors, but is not required to do so, except
15 in cases where two or more opinions are equally well-supported and consistent
16 with the record. *Id.*

17 Supportability and consistency are further explained in the regulations:

18 (1) *Supportability*. The more relevant the objective medical
19 evidence and supporting explanations presented by a medical
20 source are to support his or her medical opinion(s) or prior
21 administrative medical finding(s), the more persuasive the
22 medical opinions or prior administrative medical finding(s) will
be.

23 (2) *Consistency*. The more consistent a medical opinion(s) or
24 prior administrative medical finding(s) is with the evidence from
25 other medical sources and nonmedical sources in the claim, the
26 more persuasive the medical opinion(s) or prior administrative
27 medical finding(s) will be.
28

20 C.F.R. § 416.920c(c). The Ninth Circuit has additionally held that the new regulatory framework displaces the longstanding case law requiring an ALJ to provide “specific and legitimate” or “clear and convincing” reasons for rejecting a treating or examining doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022).

The ALJ reasonably considered both the supportability and consistency factors in discussing the opinions from Dr. Artzis and Dr. Ashworth, noting the lack of explanation or objective support for Dr. Artzis’s opinion and the vagueness and inaccurate information contained in Dr. Ashworth’s opinion. Tr. 28. Plaintiff offered no specific challenge to the ALJ’s rationale regarding either of these sources. ECF No. 18 at 14-19.

VIII. CONCLUSION

The Court has reviewed the record and the ALJ’s findings and the Court finds the ALJ’s decision is supported by substantial evidence and free of legal error and is affirmed. Therefore, **IT IS HEREBY ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 19**, is **GRANTED**.

2. Plaintiff’s Motion for Summary Judgment, **ECF No. 18**, is **DENIED**.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED September 6, 2022.




JAMES A. GOEKE
UNITED STATES MAGISTRATE JUDGE